Petition

81-494

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In the Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM L. CAHALAN,
PETITIONER,
vs.

SHARON WALKER, AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF LEE DELL WALKER,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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QUESTION PRESENTED

IS THE DEFENDANT IN A LIBEL CASE CONSTITUTIONALLY ENTITLED TO SUMMARY JUDGMENT WHERE THE PLAINTIFF, AN ADMITTED PUBLIC FIGURE, FAILS TO PLEAD ANY FACTS SHOWING MALICE, ALLEGING IT IN ONLY THE MOST CONCLUSORY TERMS?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

NOW COMES William L. Cahalan, Prosecuting Attorney for the County of Wayne, by Edward Reilly Wilson III, Principal Attorney, Appeals, and TIMOTHY A. BAUGHMAN, Assistant Prosecuting Attorney, and prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Michigan, entered in the above-entitled cause on April 1, 1981, reconsideration denied on July 14, 1981.

OPINIONS BELOW

The opinion of the trial court is appended at Appendix A. The opinion of the Michigan Court of Appeals is reported at 97 Mich App 396; ____ NW 2d ____ (1980) and is appended as Appendix B. The order of the Michigan Supreme Court is reported at 411 Mich 857 (1981) and is appended as Appendix C. The order denying reconsideration is appended as Appendix D.

STATEMENT OF JURISDICTION

The opinion of the Michigan Court of Appeals was issued May 6, 1980. The order of the Michigan Supreme Court was issued April 1, 1981, reconsideration denied July 14, 1981. The jurisdiction of this Court is invoked under 28 USC 1257(3) and *California* v *Stewart*, decided *sub nom Miranda* v *Arizona*, 384 US 436 (1966).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment provides, in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of

life, liberty, or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

On June 28, 1954, Lee Dell Walker was convicted of the first-degree murder of a Detroit grocer named John Drousiotis. He had confessed to the crime.

On September 21, 1961, Walker's delayed motion for new trial attacking the voluntariness of his confession was denied by the trial judge. An equally divided Michigan Supreme Court affirmed on December 2, 1963.

After the decision of *Jackson* v *Denno*, 378 US 368 (1964), the Michigan Supreme Court granted rehearing and remanded for a voluntariness hearing pursuant to *Jackson* v *Denno*. That hearing was held, and on April 27, 1965, the trial judge found the confession voluntary. The Michigan Court of Appeals affirmed on April 25, 1967 [6 Mich App 600; 149 NW 2d 912 (1967)]. The Michigan Supreme Court denied leave on October 4, 1967 (378 Mich 781), and this court denied certiorari, 393 US 1028 (1969).

On May 15, 1972, the trial judge's successor granted a new trial, holding that the trial judge had erred in mixing trustworthiness considerations with voluntariness. On September 15, 1972, the Michigan Court of Appeals denied the prosecution's complaint for superintending control. The People moved to nolle prosequi given the loss of evidence and witnesses after 18 years, and that motion was granted on December 12, 1972.

In December of 1973, a bill was introduced in the Michigan legislature to "compensate" Lee Dell Walker by awarding him

$25,000 for the "wrong done him" by the citizens of the state. On July 8, 1974, the bill passed the Michigan Senate and was referred to the House Appropriations Committee.

On September 19, 1974, petitioner, prosecutor William L. Cahalan, sent a letter to the members of the House Appropriations Committee and released it to the press. The letter urged defeat of the bill, stating that no wrong had been done Lee Dell Walker; that he had justly been convicted of a murder which he had committed; and concluding, "If Lee Dell Walker is to be rewarded with $25,000, give it to him for his persistence. Do not commit the final perversion of stating that a guilty man is innocent."

On January 22, 1975, respondent filed a complaint (amended February 26, 1975) alleging a number of counts against petitioner Cahalan and a newspaper columnist, including defamation. The only reference to malice was that petitioner acted "maliciously" and that the statements were "malicious" and violation of 42 USC 1983. The cause was removed to federal district court by petitioner, where the district judge granted summary judgment to petitioner on the grounds of absolute immunity. The Sixth Circuit reversed (542 F2d 681) as to the state law defamation count, finding only a qualified immunity under state law and remanding for a determination as to malice. This Court denied certiorari.

The matter was remanded back to Wayne Circuit Court, where the trial judge granted summary judgment on the ground of absolute immunity under state law. As an alternative ground for the motion, petitioner had alleged respondent's failure to allege actual facts showing malice (respondent is concededly a public figure), so that summary judgment was necessary under First Amendment law. Respondent appealed to the Michigan Court of Appeals, and petitioner defended the trial court's ruling, and also argued that the trial judge, even if in error, reached the "right result for the

wrong reason," asserting, among other grounds, the First Amendment defense. The Michigan Court of Appeals affirmed on May 6, 1980, finding that indeed the trial judge had reached "the right result for the wrong reason," as the petitioner/prosecutor was only entitled to a qualified immunity, but respondent had failed to present factual allegations of actual malice, particularly in light of the affidavit filed by petitioner in support of the motion for summary judgment.

Respondent applied to the Michigan Supreme Court for leave to appeal, and petitioner defended the ruling of the Court of Appeals, arguing alternatively that petitioner was entitled to absolute immunity, and also entitled to summary judgment under First Amendment principles because of the failure to plead malice adequately. On April 1, 1981, the Michigan Supreme Court reversed, finding that petitioner's affidavit was insufficient to put respondent/plaintiff "to the burden of presenting evidentiary facts of actual malice to withstand a summary judgment action." Petitioner moved for rehearing, alleging that the ruling was wrong as a matter of Michigan law and wrong as a matter of First Amendment law. Rehearing was denied on July 14, 1981.

REASONS FOR GRANTING

Respondent in this matter is concededly a public figure [see *Walker* v *Cahalan*, 542 F2d 681 (Cal, 1976)]. Petitioner therefore cannot be held liable for defamation unless respondent proves that the publication was made with "actual malice"; that is, with knowledge that it was false or with reckless disregard of whether it was false or not. *New York Times* v *Sullivan*, 376 US 254, 279-280 (1964). Respondent has pleaded no facts showing actual malice on the part of petitioner, and indeed has failed even to allege that petitioner

knew the statements he made were false, or that he acted in reckless disregard of the truth (of course, petitioner also still maintains that his statements were true). Petitioner submits that under these circumstances he has a constitutional right to summary judgment.

Petitioner/Prosecutor Cahalan filed an affidavit in support of his motion for summary judgment, stating that he felt it a matter of the public interest that he was opposed to the appropriation bill, and that he believed his statements to be true, as they were based on the records of the criminal case. Respondent has to this day never alleged facts showing to the contrary, yet petitioner is to be subjected to trial for damages of $2,000,000. The chilling effect is apparent. The chilling effect of facing trial is the very reason why summary proceedings are the rule rather than the exception in First Amendment Cases, for, as stated in *Washington Post* v *Keogh*, 365 F2d 965 (CA DC, 1966), "the stake here, if harassment succeeds, is free debate." This remark is especially appropriate to the instant case, involving a letter to the legislature, released to the press, concerning the expenditure of public funds for an alleged wrong done by the "citizens of the state." The lower courts have held time and again that:

> To survive summary judgment proceedings it is necessary that (plaintiff) offer some evidence upon which a jury could find convincing clarity . . . of actual malice or reckless disregard. *Ragano* v *Time*, 302 F Supp 1010 (DC Fla, 1969).

See also *Wolston* v *Reader's Digest*, 429 F Supp 167 (DC DC, 1977); rev'd on other grounds, 443 US 157 (1979); *Oliver* v *Village Voice*, 417 F Supp 235 (DC NY, 1976); *Dileo* v *Koltnow*, 613 P2d 318 (Colo, 1980); *Good Government Group* v *Superior Court*, 586 P2d 572 (1978).

As well put in *Batson* v *Time*, 298 So 2d 100, 103 (1974):

> . . . summary dismissal of a libel action, where plaintiff fails to make the required initial showing, is constitutionally mandated to avoid the abhorred and constitutionally reprobated 'chilling effect' that the prosecution of an unfounded libel action would otherwise have on the fundamental guarantee of freedom of speech and freedom of the press.

This Court has not had occasion to address the question of the standard of proof constitutionally necessary to withstand summary judgment in this area. However, in *Hutchinson* v *Proxmire*, 443 US 111 61 L Ed 2d 411, 422 at fn 9 (1979), this Court expressed "some doubt" about the "rule" favoring summary judgment in First Amendment cases, but stated that the issue is "not before us." Petitioner submits that the present case demonstrates the validity of the rule, and places the issue before the Court in a manner such that certiorari should be granted.

CONCLUSION

WHEREFORE, Petitioner respectfully concludes that for the above reasons, particularly in light of *Hutchinson* v *Proxmire*, a substantial issue of constitutional law is presented such that plenary review should be granted.

Respectfully submitted,

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Dated: August 5, 1981
TAB:er

APPENDIX ON APPEAL

APPENDIX A

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

LEE DELL WALKER,
Plaintiff,

vs. C.A. No: 75-052-476-NZ

WILLIAM CAHALAN,
Defendant.

OPINION

The defendant, William L. Cahalan, Prosecuting Attorney, County of Wayne, State of Michigan, moves for summary judgment based upon the grounds set forth in his Motion together with the affidavits and exhibits attached thereto. It is alleged that the plaintiff has failed to state a cause of action upon which relief can be granted [GCR 117.2 (1)] in that plaintiff's claim seeks to hold defendant Cahalan liable for alleged defamatory statements made in the pursuit of defendant's official duties and as to which defendant Cahalan has official immunity.

The principal contention of the defendant is that the alleged defamatory statements were absolutely privileged.

The Court accepts the statement of facts as set forth in the prosecutor's brief along with the pleadings, briefs and exhibits in the case. They appear to cover the circumstances covering the issues presented in the case.

The plaintiff was originally convicted by a jury in the Recorder's Court for the City of Detroit on June 28, 1954 of the crime of murder in the first degree and was subsequently sentenced to a mandatory life sentence by the Honorable John A. Ricca who presided at plaintiff's trial.

There were various post-conviction proceedings, most of which were initiated by the plaintiff Lee Dell Walker in his efforts to free himself from prison. As a matter of record, some of these proceedings at the appellate level may be found in decisions rendered by the Michigan Supreme Court and the Michigan Court of Appeals in *People* v *Walker*, 379 Mich 781 (1967), certiorari denied in 396 US 1028 (1969); 374 Mich 331 (1965); 371 Mich 599 (1963); 6 Mich App 600 (1967) and the original trial which can be found transcribed in Recorder's Court File No. A-76081. In addition thereto, various other judicial proceedings took place at the trial court level.

The genesis of the present lawsuit began with a felony murder resulting from an attempted robbery of a small grocery store approximately 23 years ago.

On February 17, 1954, a grocer named John Drousiotis was shot during a holdup of his corner grocery which he operated together with his wife at 6657 Roosevelt in the City of Detroit. The holdup attempt and murder was perpetrated by two men early in the evening both of whom escaped from the store after the shooting. The grocer's wife and a young clerk were eye witnesses to the murder of Drousiotis.

Several weeks later, about four o'clock on a Friday afternoon on March 26, 1954, an attempted street holdup of a young Kroger Supermarket messenger named Edward Nasternak had been reported to the Detroit police and one eye witness had given a description of the escape car. This witness who was a gas station attendant drove with police officers around the neighborhood of the attempted holdup and

was able to point out the escape car which was found parked within a few blocks of the holdup scene. Through its registration, the car was traced to Lee Dell Walker and he was arrested at about 4:30 a.m. on March 27, 1954 in front of 8110 American Avenue in the City of Detroit when he alighted from a taxicab. [See prosecutor's Exhibit K.]

On March 27, 1954, Walker had attempted by telephone to report the alleged theft of his car, a green and cream colored Kaiser, License No. BA 3078. He was reportedly told that it would be necessary for him to make the stolen car report in person to the precinct station but he did not so report. In the meantime Walker's car had been impounded by Detroit police officers and upon raising the hood of the car in order to check the registration number, the officers discovered a 32-caliber revolver wrapped in a blue cloth stuffed over the windshield washer mechanism. The gun was later identified as the weapon which had been used in the fatal shooting of Drousiotis as well as the gun which had been used in another holdup shooting at 2900 W. Euclid in the City of Detroit on February 15, 1954. This latter holdup was one of two robberies in addition to the Drousiotis killing which Walker formally confessed to having committed. A formal confession was given by Walker to Assistant Prosecuting Attorney John D. Dingell, Jr. on March 30, 1954, wherein he admitted his participation in the armed holdup of a grocery store at 2900 W. Euclid in the City of Detroit. [Copy of this exhibit was attached to prosecutor's brief as Exhibit A]. Mr. Walker made a similar confession in a formal statement to Assistant Prosecuting Attorney John D. Dingell, Jr. on March 30, 1954 in respect to another holdup he committed of Brown's Grill at 420 East Forest in the City of Detroit [See prosecutor's brief, Exhibit B for copy of this confession]. Plaintiff herein also confessed to the murder of John Drousiotis in the attempted holdup of his grocery store located at 6657

Roosevelt Street in the City of Detroit on February 17, 1954. This confession was made in a formal statement given to Assistant Prosecuting Attorney William J. Coughlin in the offices of the Prosecuting Attorney for the County of Wayne on March 31, 1954. [See prosecutor's brief, Exhibit C]. This latter confession, involving the murder of Drousiotis, was admitted into evidence against him at his trial in Recorder's Court for the City of Detroit. On June 28, 1954, Mr. Walker was convicted by a jury of first-degree murder and on July 12, 1954, he was sentenced to life imprisonment by the Honorable John A. Ricca.

A long series of untimely post-conviction appeals followed Mr. Walker's trial. On September 21, 1961 his delayed motion for a new trial attacking the voluntariness of his confession was denied by Judge Ricca.

On March 15, 1962, Mr. Walker was granted leave to file a delayed appeal by the Michigan Supreme Court and on December 2, 1963, the Supreme Court of the State of Michigan affirmed Judge Ricca's denial of a new trial finding that there was no violation of Mr. Walker's constitutional rights that would render his confession inadmissible as a matter of law. [See *People* v *Walker*, 371 Mich 599 (1963)].

This case again appeared before the Supreme Court of the State of Michigan in April, 1964 following the publication of the decision in *Jackson* v *Denno*, 378 US 368, 84 S.Ct. 1774, 12 L Ed 2d 908 (1964) and the matter was remanded to the trial court for the purpose of making a determination upon a separate record as to the voluntariness of the confession only. The evidentiary hearing began before the Honorable John A. Ricca, Recorder's Court Judge, on February 9, 1965 and continued for seven (7) full days. The People upon whom devolved the burden of proof to show that the confession was in fact voluntary called twenty-three (23) witnesses.

The People presented, among their witnesses, every police officer who had had any contact with Mr. Walker both immediately before and after his arrest and during his detention up to the point when he confessed to Assistant Prosecuting Attorney William J. Coughlin on March 31, 1954. [A copy of this was attached to the prosecutor's brief, Exhibit D].

The defendant Walker called four (4) witnesses and himself took the stand. The four (4) witnesses included his attorney at the Habeus Corpus Hearing (held at the time of his original arrest) as well as his attorney on Appeal and at the Remand Hearing.

The finding of the trial court as to the voluntariness of his confession was appealed by Mr. Walker and the Michigan Court of Appeals affirmed the Opinion and Order Finding Confession Voluntary entered by the Honorable John A. Ricca. [See *People* v *Walker*, 6 Mich App 600 (1967)]. Leave to appeal was denied by the Michigan Supreme Court by Order dated October 4, 1967. [See 379 Mich 781].

The United States Supreme Court denied certiorari in an Order cited at 393 US 637 (1969).

In March of 1972 Mr. Walker caused to be filed in the trial court a motion for leave to file a delayed motion for new trial to review the rulings and decisions made and entered in this case. Despite the challenge of the People during the proceedings before the Honorable Robert L. Evans that the appellate courts of this State had heretofore reviewed the facts and law of this case on appeal and that their decisions constituted the law of this case and therefore binding on the lower court, nevertheless, on May 15, 1972 Judge Evans entered an Opinion and Order Granting Leave To File Motion For New Trial. [Opinion and Order attached to prosecutor's brief — Exhibit E]. A complaint for superintending control and motion for order to show cause filed by

the People were denied by the Michigan Court of Appeals on September 29, 1972. [See prosecutor's brief, Exhibit F].

Subsequent thereto a Petition for Order to Nolle Prosequi was filed on December 11, 1972 in this cause by the Prosecuting Attorney for the County of Wayne setting forth his reasons for not proceeding with a retrial of this matter. In substance they amounted to the nearly impossible task of "persuasively presenting a case in Court that is over 18 years old." Specifically, the obstacles were listed as the destruction of evidence, location of witnesses and changes in the controlling law. [See Exhibit G of prosecutor's brief – Petition for Order of Nolle Prosequi]. Thereafter an Order of Nolle Prosequi was entered by the Honorable Robert L. Evans on December 12, 1972. [See prosecutor's brief Exhibit H].

In December of 1973, then State Senator Coleman Young introduced a bill in the Michigan Senate for the purpose of appropriating $25,000.00 in State of Michigan funds to compensate Mr. Walker, "solely out of humanitarian consideration for the wrong done Lee Dell Walker by the citizens of the State". The bill was passed by the Michigan Senate on July 8, 1974, and was then referred to the House Appropriations Committee. Several newspaper articles were written on the Lee Dell Walker case many of which are attached to the pleadings filed in this cause by The Detroit News who appeared originally as a defendant in this action but has since been dismissed.

On or about September 19, 1974, defendant William Cahalan prepared a letter which was sent to the Honorable William R. Copeland, Chairman, and also to each of the members of the House Committee on Appropriations of the State of Michigan Legislature. [Copy of Cahalan's letter attached to prosecutor's brief – Exhibit I]. In this letter defendant Cahalan set forth in detail the factual background of this case and expressed his reasons for opposing the proposed

legislation to compensate Mr. Walker alluding to facts which were matters of public record. Plaintiff, who concedes that he was a "public figure", claims to have been libeled by the sending of this letter not to the state legislature but to The Detroit News. It now forms the basis of his present lawsuit.

This action was originally commenced in the Circuit Court for the County of Wayne alleging a common law libel count as well as a civil rights violation under 42 USC §1981 and §1983. [Respondent later abandoned his claim for relief under 42 USC §1981 and announced that he would rely only upon 42 USC §1983].

Defendants removed the entire action to the United States District Court for the Eastern District of Michigan, Southern Division. Upon a voluminous record as to the undisputed facts, the District Court granted defendants Motions for Summary Judgment as to respondent Walker's claims for libel and invasion of privacy. In response to a Motion For A More Definite Statement, respondent Walker was then ordered to plead any additional facts supportive of his federal civil rights claims.

On appeal the Court of Appeals for the Sixth Circuit affirmed as to the newspaper and its reporter, but as to the public prosecutor, affirmed only as to the civil rights claim, remanding the defamation claim to the United States District Court "for a determination of the absence or presence of (common law) malice".

An application for a Writ of Certiorari was filed by defendant Cahalan and denied on April 20, 1977. Thereafter a Motion To Remand was heard by the United States District Court and an Order was entered remanding the present cause of action to the Circuit Court for the County of Wayne.

The Court is now presented with a Motion for Summary Judgment. The principal issue is whether the plaintiff has failed to state a claim upon which relief can be granted in that

Defendant Cahalan's alleged defamatory statements fell within his official duties and are, therefore, absolutely privileged.

Defendant Cahalan, as the Prosecuting Attorney for the County of Wayne, is charged with the duty of prosecuting criminal actions arising in Wayne County and of protecting the interests of the State of Michigan [MCLA 49.153]. His office was directly responsible for prosecuting murder charges against plaintiff and protecting the interests of the State with regard to plaintiff. His letter to the House Appropriations Committee was in opposition to the expenditure of public funds to compensate plaintiff for allegedly having been unjustly tried, convicted and imprisoned for murder in 1954. These allegations were, in part, based on the fact that defendant Cahalan had not retried plaintiff after granting of a new trial in 1972. Cahalan's letter expressed his reasons for his opposition to the legislation — facts of public record within the purview of the prosecutor's office — and his reasons for not retrying plaintiff. His letter was absolutely privileged.

Public officials are cloaked with an absolute privilege against libel actions arising out of and in connection with the performance of their public office. They are absolutely privileged to communicate matters within the scope of their offices to other public offices and to the public — and to use the press to so communicate.

It is well established in Michigan law that statements made by public officials in the pursuit of their duties are absolutely privileged. While rejecting a claim of absolute privilege on the grounds that the statements made did not constitute part of defendant's official duties, the Michigan Court of Appeals in the case of *Brunn* v *Weiss* (1971) reviewed the extensive Michigan cases upholding absolute immunity in the following terms:

"In *Wachsmuth* v *Merchants National Bank* (1893), 96 Mich 426, it was stated that a resolution offered in the line of duty by a city council member was absolutely privileged. In *Trebilcock* v *Anderson* (1898),117 Mich 39, a mayor's veto message was held absolutely privileged. In *Madill* v *Currie* (1912), 168 Mich 546, the defendant was a chairman of a committee appointed by the board of supervisors to audit the accounts of the county treasurer. The defendant released the results of the audit and the court held that he had a qualified privilege stating that if the result had been released as the official report of the comittee there would have been an absolute privilege. In *Bolton* v *Walker* (1917), 197 Mich 699, a statement by a member of the Detroit Poor Commission during the course of proceedings before that commission has held absolutely privileged. In *Powers* v *Vaughan* (1945), 312 Mich 297, the defendants were officials of the Detroit Department of Health. The plaintiffs had petitioned the city council for a license to operate as a masseur. The council referred this petition to the Department of Health and the department's report was found to be absolutely privileged.

Under the foregoing authorities we must conclude that under some circumstances the members of the school board would have an absolute privilege. However, we also conclude that in this case the privilege is conditional. In the cases finding an absolute privilege the allegedly defamatory statements were made in the course of carrying out an official duty. The making of the statements that contained the allegedly defamatory remarks was an essential function of the official position held by the defendants. The publishing of a newsletter may be closely enough related to the official duties of the board members to give them a conditional privilege, but there is no absolute privilege." *Brunn* v *Weiss*, 32 Mich App 428, 430-431; 188 NW 2d 904, 905 (1971).

In the present case defendant Cahalan was found to be acting within the scope of his official duties by both the United States District Court and the United States Court of Appeals (6th Circuit) and therefore absolutely privileged.

The privilege accorded government officers as respects civil suits to recover for actions taken by them in the exercise of their official functions reflects the view that it is important that such officers be free to exercise their duties unembarrassed by the fear of damage suits.

In *Barr* v *Matteo*, 360 US 564, 3 L Ed 2d 1434 (1959), the alleged libel was contained in a press release issued by the defendant, the acting director of the Office of Rent Stabilization:

> "Respondents sued, charging that the press release, in itself and as coupled with the contemporaneous news reports of senatorial reaction to the plan, defamed them to their injury, and alleging that its publication and terms, had been actuated by malice on the part of petitioner. Petitioner defended, inter alia, on the ground that the issuance of the press relase was protected by either a qualified or an absolute privilege. *** (p 1439)
>
> " *** we again granted certiorari *** to determine whether in the circumstances of this case petitioner's claim of absolute privilege should have stood as a bar to maintenance of the suit despite the allegations of malice made in the complaint." (p 1440)

The Supreme Court stated the necessity for, and the basis of the absolute privilege:

> "The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties — suits which would be devoted to governmental service and the

threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." (p 1441)

" *** The privilege is not a badge or emolument of exalted office, but an expression of a policy, designed to aid in the effective functioning of government.*** (p 1442)

" *** It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted — the relation of the act complained of to 'matters committed by law to his control or supervision,' *** which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits."

" *** The issuance of press releases was standard agency practice, as it has become with many governmental agencies in these times. We think that under these circumstances a publicly expressed statement of the position of the agency head, announcing personnel action which he planned to take in reference to the charges so widely disseminated to the public, was an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively. It would be an unduly restrictive view of the scope of the duties of a policy-making executive official to hold that a public statement of agency policy in respect to matters of wide public interest and concern is not action in the line of duty. *** (p 1443)

"The fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable, despite the allegations of malice in the complaint, for as this Court has said of legislative privilege:

> 'The claim of an unworthy purpose does not destroy the privilege.' *** (p 1443)

In his concurring opinion, Mr. Justice Black stressed the duty of the public official to keep the public informed:

> "The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees. Such an informed understanding depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important." (p 1444)

> " *** It is enough for me here that the press release was neither unauthorized or plainly beyond the scope of Mr. Barr's official business, but instead related more or less to general matters committed by law to his control and supervision. *** " (p 1445)

In *Glass* v *Ickes*, 117 F 2d 273 (D.C. 1940), 132 ALR 1328; cert. den. 85 L Ed 468, the court affirmed dismissal of the complaint for failure to state a cause of action:

> "The appellant's action is one for defamation, and is based on an allegedly libelous press release issued by the appellee, present Secretary of the Interior (referred to herein as the Secretary). The material allegations of the complaint are as follows: On November 23, 1938, the Secretary 'wilfully and maliciously published, released, circulated and delivered to the Press Associations *** and to divers other persons, and caused to be published to the world, a false and defamatory written memorandum press release ***' *** (p 274)

> * * *

> " 'We are of the opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in

the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of executive departments when engaged in the discharge of duties imposed upon them by law. ***' " (p 276)

* * *

"The principle laid down in the Vilas decision[1], to the effect that a Departmental head is absolutely privileged from liability for defamatory statements made 'more or less [in] connection with the general matters committed by law to his control or supervision', has been applied by this court on several occasions. Despite the appellant's apparent dissatisfaction with the rule it appears to be well settled. *** (p 277)

"Some contention is made by the appellant that this privilege applies only to communications between governmental officials, and not to those from an official to the general public. No such limitation is justified by the language of the Supreme Court in the Vilas case nor has this court recognized such a distinction. On the contrary, we have previously held a communication, released generally to the press, within this executive privilege. *** (pp 277-278)

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[1] In *Spalding* v *Vilas*, 161 US 483 (1896), the Supreme Court affirmed dismissal of a libel suit against the U.S. Postmaster General who had sent a circular to all active and retired postmasters advising them that they did not need the services of the plaintiff, a Washington, D.C., lawyer, to obtain review and readjustment for a number of his clients against the defendant. The circular sent by the defendant was alleged to have been malicious and in retaliation to the plaintiff's previous victories over the defendant. Nevertheless, the Supreme Court held that the Postmaster General was absolutely privileged in sending the circular, and its issuance was held to be within his duties.

The absolute privilege has been broadly applied to both state and federal inferior officials: See 58 Mich L Rev 295 citing its application to, inter alia, state attorneys general, county district attorneys and assistant U.S. attorneys general. Particularly see *Matson* v *Margiotti*, (Pa 1952) 88 A 2d 892 holding that the state attorney general was absolutely privileged in drafting a letter to a county district attorney, advising him of facts concerning alleged communist background of an assistant district attorney — and sending copies of the letter to newspapers prior to its delivery to the district attorney. The court held that it is "in the public interest to permit an attorney general to keep the public advised of his official acts and conduct" and therefore delivery of the letter to the public press was "within the protection of the absolute privilege accorded in this case to the attorney general." (p 900)

The principle of absolute privilege, including the complementary right of the official to speak through the public media, has become hornbook general law:

132 ALR 1347 (§IV):

> "The absolute privilege which protects an executive officer in respect of statements made in the line of his duty, or which have 'more or less connection with the general matters committed by law to his control or supervision,' extends to statements issued for publication and published in the public press where the press is reasonbly employed as a means of bringing the statements to the attention of the persons specially interested in them."

Prosser on Torts, 2nd Ed., p 626

> "Any reasonable and appropriate method of publication may be adopted which fits the purpose of protecting the particular interest. The dictation of a business letter to a stenographer, use of the telegraph where time is important, or publication in a newspaper in order to reach the public or a large number of interested persons may be

> privileged on a proper occasion. The instruments of communication, such as the newspaper, are themselves, privileged to aid in the publication, wherever the privilege in fact exists; *** "

In Michigan it has long been settled that an official's public explanation of his actions or conduct is within the privilege. See *Trebilcock* v *Anderson*, 117 Mich 39 (1898), holding absolutely privileged the publication of the defendant mayor's message to the Common Council giving his reasons for a veto and printed in the city's newspaper.

In the recent decision of *Tocco* v *Piersante*, 69 Mich App 616 (1976) the Court of Appeals held that no absolute privilege in malicious defamation cases is provided for communications made in the line of duty by executive officials. The trial court in *Tocco* had decided that, in keeping with Michigan law, such a privilege did exist when the official was performing discretionary as opposed to ministerial functions within the scope of his duties. In so ruling the trial court held inapplicable the decision in *Raymond* v *Croll*, 233 Mich 268 (1925) on the grounds that the defendant in Croll was performing a ministerial as opposed to a discretionary act and that an absolute privilege would therefore not be available. However, the Court of Appeals in reversing the trial court in *Tocco, supra,* placed its reliance solely on *Raymond* v *Croll* as controlling authority and its rejection of *Barr* v *Mateo, supra*. In *Raymond* v *Croll* the defendant was required by the duties of his office to perform the act in question and the court correctly held that there was no absolute privilege in the performance of these ministerial duties.[2] *Raymond* v *Croll* is inapposite to the instant case because it did not involve the issue

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[2] "Mr. Croll, the defendant, is a State official entitled to be called budget director. In addition to his other duties he was required by the State administrative board to purchase material for the construction of highways and to investigate the financial responsbility of bidders for State trunk line contract." [Cf. *Raymond* v *Croll, supra*, at 271]

of immunity of high level executive officials for discretionary acts performed in the course of their official duties.

In the case of *Stewart* v *Troutt*, 73 Mich App 378 (1977) Judge Donald E. Holbrook discusses the test to be applied covering absolute privilege and qualified privilege. He stated:

> "The test as to the nature of the privilege is whether the making of the statement that contained the allegedly defamatory remarks was an essential function of the official position held by the defendant. Therefore, we must know whether the investigation of allegedly unethical conduct of the plaintiff was within the power of the city council and whether the mayor was acting in his official capacity in investigating plaintiff and in making these allegedly slanderous remarks about him. If so, then defendant had an absolute privilege and no action can be brought. Analogizing to *Brunn, supra*, if this investigation and the publication of these comments was not closely related to defendant's official duties then only a qualified privilege results, requiring a showing of malice in order to recover. Plaintiff did allege the existence of malice on the part of defendant in making these statements. See, *New York Times Co* v *Sullivan*, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686; 95 ALR 2d 1412 (1964). If the defendant had no powers or duties which would justify such investigation and statements, then no privilege could attach. However, if these statements were made during an exercise of any essential function of his office, the mayor had an absolute privilege. [At 387]

The defendant in this case wrote the letter containing the alleged defamatory remarks as prosecutor for the County of Wayne and as an essential function of his office. He had acted as prosecutor in handling the case of Lee Dell Walker therefore any statements that he made were made during the exercise of an essential function of his office and his duties. He had a duty to inform the members of the legislature and the public as to the background of the case.

In the case of *Bennett* v *Attorney General*, 65 Mich App 203 (1975) the Court of Appeals held per curiam opinion that absolute privilege or judicial privilege was granted to the attorney general for alleged defamation.

The court adopts the arguments of the defendant based upon the pleadings and circumstances that the plaintiff has failed to state a claim upon which relief can be granted in that defendant Cahalan's alleged defamatory statements fell within his official duties and are, therefore, absolutely privileged.

The Motion for Summary Judgment is hereby granted.

/s/ THEODORE R. BOHN,
Circuit Judge

APPENDIX B

WALKER v *CAHALAN*

Docket No. 78-654. Submitted February 6, 1980, at Detroit. — Decided May 6, 1980.

Lee Dell Walker brought in circuit court an action for defamation against William Cahalan, the Wayne County prosecutor, Pete Waldmeir, a newspaper columnist, and The Detroit News. This action arose out of a letter written by defendant Cahalan in 1974 and addressed to the chairman of the Committee on Appropriations of the Michigan House of Representatives, which was then considering a bill to appropriate $25,000 to partially reimburse Walker for the time he spent in prison. The letter recounted the facts surrounding the 1954 murder of a grocery store owner, the nature of Walker's confession to that murder, and the history of the legal proceeding from Walker's conviction by a jury of first-degree murder through the numerous appeals which were affirmed, the eventual granting of a new trial, and the decision by the prosecutor to nolle prosequi the case because of the relocation of the witnesses and the destruction of evidence which had occurred in the intervening 18 years. The letter concluded that any fair-minded person could reach no conclusion other than that Walker murdered the grocery store owner. A copy of this letter was sent by defendant Cahalan to defendant Waldmeir, who incorporated the contents of that letter in his column published by defendant The Detroit News. Following the removal of this cause to the Federal court system for consideration of plaintiff's count relative to the violation of his civil rights, which resulted in summary judgment in favor of all defendants on that count, and upon the return of the cause to Wayne Circuit Court, defendant

Cahalan moved for summary judgment in circuit court, averring by affidavit that he bore no malice towards Walker and that he believed the statements in the letter to be true. The Wayne Circuit Court, Theodore R. Bohn, J., granted defendant Cahalan's motion for summary judgement, finding that Walker failed to state a claim upon which relief can be granted. Walker appealed. During the pendency of this appeal, Lee Dell Walker died, and Sharon Walker, as personal representative of the estate of Lee Dell Walker, was, by stipulation of the parties, substituted as plaintiff-appellant in the matter.

Held:

1. A motion for summary judgment based upon the failure to state a claim upon which relief can be granted tests the legal sufficiency of the pleadings. A motion for summary judgment based upon the ground that there is no genuine issue as to any material fact tests the factual support of a claim. A motion for summary judgment brought under the subsection of the court rules dealing with the failure to state a claim but which seeks to test the sufficiency of the facts will be treated as having been brought under the subsection of the rule concerning the absence of any genuine issue as to any material fact, if it is determined that neither party was misled by the failure to cite the proper subsection of the court rules.

2. A motion for summary judgment based upon the absence of any genuine issue as to any material fact may be granted only where it would be impossible for the asserted claim to be established by evidence at trial.

3. Defendant Cahalan, acting in his official capacity as prosecutor, does not have absolute immunity from tort liability, rather, he has only a qualified privilege. Having only a qualified privilege, defendant Cahalan

possessed a conditional right to publish otherwise defamatory remarks. That qualified privilege could be overcome by a showing of actual malice by proof that the defamatory statement was made with knowledge that the statement was false or with reckless disregard of whether it was false or not.

4. Since plaintiff failed to offer any proof of actual malice in response to the affidavit of defendant Cahalan which averred that he had no actual malice, the motion for summary judgment was properly granted, not on the basis stated by the trial court, but rather, on the basis that there was no genuine issue as to any material fact.

Affirmed.

1. MOTIONS — SUMMARY JUDGMENT — CAUSE OF ACTION — GENUINE ISSUE OF MATERIAL FACT — PLEADINGS — PREJUDICE — COURT RULES.

A motion for summary judgment based on the failure to state a claim upon which relief can be granted tests only the legal sufficiency of the pleadings, whereas a motion for summary judgment based on the ground that there is no genuine issue as to any fact tests the factual support of a claim; a motion brought under the subsection of the court rules concerning a failure to state a claim but which encompasses a testing of the sufficiency of the facts will be treated as having been brought under the subsection of the court rules concerning a failure to sufficiently plead facts necessary to warrant relief, if neither party was misled by the failure to cite the proper subsection of the court rules (GCR 1963, 117.2[1]; 117.2[3]).

2. MOTIONS — SUMMARY JUDGMENT — GENUINE ISSUE OF MATERIAL FACT — COURT RULES.

A motion made pursuant to the court rule providing for summary judgment where there is no genuine issue as to any material fact may be granted only where it would be impossible for the asserted claim to be supported by evidence at trial (GCR 1963, 117.2[3]).

3. Torts — Governmental Immunity — High Executive Officials — Discretionary Matters — Official Duties — Qualified Privilege.

High level executive governmental officials acting in discretionary matters in the course of their official duties do not have absolute immunity from tort liability, rather, such officials have no more than a qualified privilege.

4. Libel and Slander — Qualified Privilege — Actual Malice — Knowledge of Falsity.

One having a qualified privilege possesses a conditional right to publish otherwise defamatory remarks; however, a showing of actual malice by proof that the defamatory statement was made with knowledge that the statement was false or with reckless disregard of whether it was false or not will overcome that qualified privilege.

5. Judgment — Summary Judgment — Libel and Slander — Genuine Issue of Material Fact — Affidavits — Court Rules.

Summary judgment on the basis that there is no genuine question of material fact is properly granted where a plaintiff, in an action for defamation arising out of the publication of a prosecutor's statement relative to the history of the plaintiff's criminal conviction and appeals and the prosecutor's belief in the propriety of that conviction, fails to proffer any evidence of actual malice by the prosecutor in the making of that statement in response to an affidavit submitted by the prosecutor to the effect that the prosecutor bore no actual malice

toward the plaintiff and believed the statements made to be true (GCR 1963, 117.2[3]).

Peter R. Barbara & Associates, P.C. (by *Peter R. Barbara* and *Frank G. Becker),* for plaintiff.

William L. Cahalan, Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Rheo C. Marchand* and *Maura D. Corrigan,* Assistants Prosecuting Attorney, for defendant.

Before: N.J. KAUFMAN, P.J., and D.E. HOLBROOK, JR and R.M. MAHER, JJ.

PER CURIAM. Plaintiff[1] appeals from a summary judgment entered in defendant Cahalan's favor in plaintiff's defamation action. Plaintiff alleged defendant Cahalan defamed him in a September 19, 1974, letter defendant Cahalan addressed to William R. Copeland, Chairman of the House Committee on Appropriations. At the time, that committee was considering Senate Bill No. 1050 which would have authorized an appropriation of $25,000 to partially reimburse plaintiff for the time he spent in state prison "due to a mistake in identity and false testimony". Defendant Cahalan sent copies of this letter to the media and they, in turn, related its substance in various articles. It is the dissemination of this letter to the news media and public at large which plaintiff claims to be defamatory.

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[1] This action was commenced in circuit court by Lee Dell Walker. subsequent to the filing of this appeal, Lee Dell Walker died. By stipulation of the parties, Sharon Walker, personal representative of the estate of Lee Dell Walker, was substituted as plaintiff-appellant. The term "plaintiff" when used in this opinion will refer to the original plaintiff, Lee Dell Walker, rather than the present plaintiff, the personal representative of his estate.

To better assess the substance of the instant dispute, we must briefly trace the path this litigation has taken through our court system.

On February 17, 1954, a grocer named John Drousiotis was shot during a holdup of his corner grocery store at 6657 Roosevelt in the City of Detroit. The holdup and murder were perpetrated by two men, both of whom escaped from the store after the shooting. The grocer's wife and a young clerk were eyewitnesses to the murder of Drousiotis.

Several weeks later, on March 26, 1954, an attempted street holdup was reported to the Detroit police. The eyewitness description of the escape vehicle led to plaintiff's car. On March 27, 1954, plaintiff was arrested and his car impounded. When the police raised the hood of plaintiff's car to check the registration number, they discovered a .32-caliber revolver wrapped in a blue cloth stuffed over the windshield wiper mechanism. The gun was later identified as the weapon used in the fatal shooting of Drousiotis.

On March 31, 1954, plaintiff confessed to the murder of John Drousiotis in the attempted holdup of his grocery store. This confession was admitted into evidence against the plaintiff at the trial upon that cause held in Detroit Recorder's Court. On June 28, 1954, plaintiff was convicted by a jury of first-degree murder, MCL 750.316; MSA 28.548, and, on July 12, 1954, he was sentenced to life imprisonment.

A long series of untimely post-conviction appeals followed plaintiff's trial. On September 21, 1961, plaintiff's delayed motion for a new trial attacking the voluntariness of his confession was denied by the trial court. The Michigan Supreme Court affirmed on December 2, 1963, finding that there was no violation of plaintiff's constitutional rights that would render his confession inadmissible as a matter of law. See *People* v *Walker*, 371 Mich 599; 124 NW2d 761 (1963). This case

again appeared before the Michigan Supreme Court in April, 1964, following the publication of the United States Supreme Court decision in *Jackson* v *Denno*, 378 US 368; 84 S Ct 1774; 12 L Ed 2d 908 (1964), and the matter was remanded to the trial court for the purpose of making a determination upon a separate record as to the voluntariness of the confession. See *People* v *Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

Accordingly, a seven-day evidentiary hearing was held. The prosecution, upon whom devolved the burden of proof to show that the confession was voluntary, produced 23 witnesses. As a result, the trial court concluded that plaintiff's confession was voluntarily given. Plaintiff appealed, and this Court affirmed the trial court's conclusion. See *People* v *Walker*, 6 Mich App 600; 149 NW2d 912 (1967). Thereafter, leave to appeal was denied by the Michigan Supreme Court by its order dated October 4, 1967. See 379 Mich 781 (1967). The United States Supreme Court denied certiorari. See 393 US 1028; 89 S Ct 637; 21 L Ed 2d 573 (1969).

In March, 1972, plaintiff filed a motion for leave to file a delayed motion for a new trial in the trial court. On May 15, 1972, the trial court granted both plaintiff's motion for leave to file a motion for new trial and his motion for new trial. The prosecution thereupon filed a complaint for superintending control, which this Court denied on September 29, 1972.

On December 11, 1972, the prosecution filed a petition for nolle prosequi, setting forth as its reasons for not proceeding with retrial as: the destruction of evidence, the relocation of witnesses, the changes in the controlling law concerning the admissibility of confessions, and, generally, the nearly impossible task of persuasively presenting in court a case that is over 18 years old. On December 12, 1972, an order of nolle prosequi was entered by the trial court.

In December, 1973, a bill was introduced in the Michigan Senate for the purpose of appropriating $25,000 in State of Michigan funds to compensate plaintiff "solely out of humanitarian consideration for the wrong done Lee Dell Walker by the citizens of the State". The bill was passed by the Michigan Senate on July 8, 1974, and was then referred to the House Appropriations Committee. On September 19, 1974, defendant Cahalan sent a letter to the members of the House Committee on Appropriations as well as to members of the news media. It is the dissemination of this letter to the news media and public at large which lies at the basis of plaintiff's defamation action.

In defendant Cahalan's letter, sent nearly one year following the nolle prosequi order, he stated, in pertinent part: "No wrong was done to Lee Dell Walker. There was no mistake in identity. There was no false testimony. Lee Dell Walker was justly convicted of a crime that he committed — the murder of John Drousiotis". Defendant Cahalan also stated that: "In effect, Judge Evans reversed the rulings of another Recorder's Court judge, the Court of Appeals, the Michigan Supreme Court and the United States Supreme Court. His opinion is contrary to the law as it existed at the time of the trial and as it exists now." Defendant Cahalan further stated: "Lee Dell Walker murdered John Drousiotis. There is no other conclusion that can be reached by any fair-minded person who reviews the evidence in this case." The letter concluded with the following: "The lesson learned is that if a criminal tries long enough and hard enough and goes through enough judges, sooner or later he will find one sympathetic to his cause. If Lee Dell Walker is to be rewarded with $25,000, give it to him for his persistence. Do not commit the final perversion of stating that a guilty man is innocent."

On September 26, 1974, after defendant Cahalan had sent him a copy of the letter, Detroit News columnist Pete Wald-

meir wrote a column which directly incorporated Cahalan's letter. In addition, defendant Cahalan's letter was reported in the Detroit Free Press. On January 22, 1975, plaintiff filed a complaint in the Wayne County Circuit Court against William L. Cahalan, Pete Waldmeir and The Detroit News. On February 26, 1975, plaintiff filed a first amended complaint by right alleging eight counts against all defendants, to-wit: defamation, invasion of privacy, state constitutional grounds, and deprivation of civil rights under the Federal civil rights statute.

On March 4, 1975, defendants removed the action to the United States District Court for the Eastern District of Michigan for a consideration of plaintiff's civil rights claims. In that forum, following a series of motions, plaintiff's case was dismissed in total as to all counts and all defendants. In granting a summary judgment to defendant Cahalan, the District Court found that, in writing this letter and publishing it, the prosecutor-defendant was performing a quasi-judicial function and was thereby acting within the *absolute immunity* of his office.

On October 3, 1975, plaintiff filed an appeal of this dismissal to the United States Court of Appeals for the Sixth Circuit. In *Walker* v *Cahalan*, 542 F2d 681 (CA 6, 1976), the court affirmed the Federal District Court as to the Federal counts, but reversed the summary judgment as to the prosecutor's liability under the state charges and remanded for a determination of the absence or presence of malice.

An application for a writ of certiorari was filed by defendant Cahalan and denied on April 20, 1977. See 430 US 966; 97 S Ct 1647; 52 L Ed 2d 357 (1977). Thereafter, a motion to remand the matter to the state courts was filed by the plaintiff. After a hearing, the United States District Court entered an order dated June 9, 1977, returning the present cause of action to Wayne County Circuit Court.

The Wayne County Circuit Court granted summary judgment to defendant Cahalan, finding that, in writing and publishing the letter, he was acting within the scope of his official duties, and was, therefore, absolutely privileged. Plaintiff now appeals as of right from this determination, arguing that, on the facts of this case, defendant had, at most, a qualified privilege, and that, since plaintiff's complaint contained averments of malice sufficient to show defendant abused such privilege by publication of the letter, summary judgment was inappropriate.

It is unclear whether defendant's summary judgment motion was brought solely under GCR 1963, 117.2(1), or encompassed 117.2(3) as well. This makes our review on appeal much more dificult. See Bashara, *The Illusive Summary Judgment Rule: Sifting Through the Maze,* 1976 Det Col L Rev, 397, 400, and *Partrich* v *Muscat*, 84 Mich App 724, 728-729; 270 NW2d 506 (1978). A motion for summary judgment pursuant to 117.2(1) tests only the legal, not the factual, sufficiency of the pleadings, *Grasser* v *Fleming*, 74 Mich app 338, 342; 253 NW2d 757 (1977), whereas a motion brought under 117.2(3) is designed to test whether there is factual support for a claim. *Smith* v *Woronoff*, 75 Mich App 24, 28; 254 NW2d 637 (1977). In *Todd* v *Biglow*, 51 Mich App 346, 349-350; 214 NW2d 733 (1974), this Court held that when a motion for summary judgment is brought under 117.2(1) when it is really testing the sufficiency of the facts, the motion should proceed on the basis of 117.2(3) as long as neither party is misled. We find this to have been the case herein. Accordingly, we will review plaintiff's claims under 117.2(3).

Before a summary judgment may properly be granted under this sub-section, it must be impossible for the claim asserted to be supported by evidence at trial. *Rizzo* v *Kretschmer*, 389 Mich 363; 207 NW2d 316 (1973). We must therefore consider whether the plaintiff's claim could be supported by evidence at trial.

We find that the trial court reached the right result, albeit for the wrong reason. Michigan case law does not afford absolute immunity from tort liability to a high level executive official acting in discretionary matters in the course of his official duties. *Timmis* v *Bennett*, 352 Mich 355, 362; 89 NW2d 748 (1958), *Tocco* v *Piersante*, 69 Mich App 616, 627-628; 245 NW2d 356 (1976). Such an official is entitled to no more than a qualified privilege, *Tocco, supra*, 635, *Raymond* v *Croll*, 233 Mich 268; 206 NW 556 (1925).

The instant defendant was found to have such a qualified privilege by the United States Court of Appeals, *supra*. One having a qualified privilege possesses a conditional right to publish otherwise defamatory remarks because the defendant is advancing some interest of social importance. Prosser, Torts (4th ed), §115, pp 786-787. Where a qualified privilege exists, plaintiff, in order to recover, must affirmatively prove actual malice on the part of the defendant. *Lawrence* v *Fox*, 357 Mich 134; 97 NW2d 719 (1959), *Peisner* v *Detroit Free Press, Inc*, 82 Mich App 153, 163-164; 266 NW2d 693 (1978). *New York Times Co* v *Sullivan*, 376 US 254, 279-280; 84 S Ct 710; 11 L Ed 2d 686; 95 ALR2d 1412 (1964), held that actual malice is established by proof that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not".

The central question then becomes whether plaintiff presented sufficient factual allegations of actual malice on the part of the defendant, *i.e.*, did plaintiff affirmatively establish that defendant's statement was made with knowledge that it was false or in reckless disregard of the truth. We have extensively reviewed the materials submitted and found that the only "evidence" plaintiff proffered in opposition to defendant's summary judgment motion consisted of the barebones allegations presented in the original complaint. Plaintiff did not present one iota of evidentiary support by way of affidavits or depositions on the issue of actual malice.

After the Sixth Circuit Court of Appeals remanded this case to allow the plaintiff to show actual malice, defendant moved for a summary judgment and averred by affidavit that he bore no actual malice towards the plaintiff and believed the statements he made were true. It is noteworthy that plaintiff filed no counter-affidavit averring that the defendant had knowledge of the falsity of his statements or acted in reckless disregard of the truth. In *Zimmerman* v *Stahlin*, 374 Mich 93, 96; 130 NW2d 915 (1964), The Supreme Court stated:

> "A defendant's motion for summary judgment, supported by affidavit that the plaintiff's case is a sham and that there are no facts to support the latter's claims, requires plaintiff to submit to the court, by affidavit, deposition, or other proof, a showing of the existence of issues of facts on the merits of the case, failing which, plaintiff's case must fall and defendant is entitled to summary judgment in his favor."

Accord: *Durant* v *Stahlin*, 375 Mich 628, 638-639, 655-656; 135 NW2d 392 (1965).

In view of the foregoing, we do not find that plaintiff came forward with sufficient evidence to establish the existence of a genuine issue of material fact so as to survive defendant's summary judgment motion.[2] See *Rizzo* v *Kretschmer, supra*, 372, and *Bob* v *Holmes*, 78 Mich App 205, 211-212; 259 NW2d 427 (1977).

We can readily understand plaintiff's difficulty in presenting such evidence. Defendant's statement primarily consisted of a recitation of matters of court record. For the most part,

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[2] The recent Supreme Court case of *Steadman* v *Lapensohn*, 408 Mich 50; 280 NW2d 580 (1980), can be distinguished in that, in that case, the plaintiffs claimed that a number of the published statements were false and supported this claim with deposition testimony and affidavits. In the instant case, however, plaintiff made no such claim nor proffered any such support.

defendant traced plaintiff's criminal case through the court system and indicated the various courts that affirmed plaintiff's criminal conviction. We find nothing inherently malicious about this practice. Moreover, in the remaining portions of his letter defendant aligned himself with these various courts and concluded that, since plaintiff had been adjudged guilty, he should not be given the appropriation. On these facts, we fail to see how the trial court might have determined that defendant acted with knowledge of the falsity or reckless disregard for the truth in making these comments. Since plaintiff has not affirmatively shown the existence of a genuine issue of material fact on this question, we affirm the trial court's conclusion.

Affirmed.

APPENDIX C

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room in the City of Lansing, on the 1st day of April in the year of our Lord one thousand nine hundred and eighty one.

Present the Honorable
MARY S. COLEMAN,
Chief Justice

CR 30-146

THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

SHARON WALKER, Personal Representative of the Estate of LEE DELL WALKER,
Plaintiff-Appellant,

vs.

SC: 65245
COA: 78-654
LC: 75-052-475-NZ

WILLIAM CAHALAN,
Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we REVERSE the judgments of the Court of Appeals and the trial court, and we REMAND to the Wayne

Circuit Court for further proceedings. Defendant Cahalan's affidavit provided evidence only of his state of mind: that he bore plaintiff Walker no malice and that he believed his statements to be true. The probative value of a witness' testimony as to his own state of mind depends upon his credibility, and, when the credibility of a witness or deponent is crucial, summary judgment should not be granted. *Arber* v *Stahlin*, 382 Mich 300, 308-309 (1969). An averment of what the defendant believed or thought as distinguished from an averment of the existence of objective facts, does not put a plaintiff to the burden of presenting evidentiary facts of actual malice to withstand a summary judgment action.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 1st day of April in the year of our Lord one thousand nine hundred and eighty one.

(Seal)

/s/ Corbin R. Davis
Deputy Clerk

APPENDIX D

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room in the City of Lansing, on the 14th day of July in the year of our Lord one thousand nine hundred and eighty one.

Present the Honorable
MARY S. COLEMAN,
Chief Justice

CR 30-146a
(30-146b)

THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

SHARON WALKER, Personal Representative of the Estate of LEE DELL WALKER,
Plaintiff-Appellant,

vs.

SC: 65245
COA: 78-654
LC: 75-052-475-NZ

WILLIAM CAHALAN,
Defendant-Appellee.

On order of the Court, the motion by defendant-appellee for reconsideration of this Court's order of April 1, 1981, is considered, and the motion is DENIED, because it does not appear that said order was entered erroneously.

The motion for leave to appear as amicus curiae is thereby rendered moot, and it is DENIED.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 14th day of July in the year of our Lord one thousand nine hundred and eighty one.

(Seal)

/s/ Corbin R. Davis
Deputy Clerk

APPENDIX E

(Letterhead of Wayne County Prosecuting Attorney)

September 19, 1974

Honorable William R. Copeland,
Chairman, and Members
House Committee on Appropriations
Capitol Building
Room 118
Lansing, MI 48902

Gentlemen:

The Senate passed Senate Bill 1050, providing for the payment of $25,000 to Lee Dell Walker "for the wrong done to Lee Dell Walker by the citizens of the State of Michigan . . . due to mistake in identity and false testimony."

No wrong was done to Lee Dell Walker. There was no mistake in identity. There was no false testimony.

Lee Dell Walker was justly convicted of a crime that he committed — the murder of John Drousitious.

On February 17, 1954, two men robbed, shot, and killed John Drousitious in his grocery store in the City of Detroit.

On March 26, 1954, a man attempted to rob a bank messenger. The man attempting this robbery escaped in Lee Dell Walker's automobile.

On March 27, 1954, Walker was arrested for this — the bank messenger robbery — and for violation of parole. He was placed in a police lineup and was identified as having participated in the bank messenger robbery.

Walker confessed to having committed two other robberies — a market at 2900 W. Euclid on February 15, 1954, and Brown's Restaurant at 4412 Beaubien, on March 25, 1954.

Walker's automobile was searched, and a gun was found hidden under the hood. That gun was examined by ballistics and found to have been the weapon that fired the shot that murdered John Drousitious and that fired shots in the Euclid Avenue robbery confessed to by Walker.

At the time of Walker's arrest, he had in his possesion a wristwatch stolen from a customer during the Euclid Avenue robbery.

Walker confessed that he murdered John Drousitious during the perpetration of the robbery of his grocery store.

Walker identified the widow of John Drousitious as the woman who was in the store at the time that he killed John Drousitious.

Walker was tried for the murder of John Drousitious; and on June 28, 1954, a jury convicted him of murder — in the first degree. On September 2, 1961, a motion for a new trial was denied by the trial court. Subsequently, the Michigan Supreme Court reviewed the case and affirmed the conviction — People v Walker, 371 Mich 599 (1963).

At the time of Walker's trial, it was the law that the voluntariness of the confession would be determined by the trial jury. Ten years later the United States Supreme Court in the case of Jackson v. Denno, 378 US 368, 84 S.Ct. 1774, 12 L.Ed. 2d 908 (1964), decided new law stating that the same jury that decides the defendant's guilt or innocence may not also decide the voluntariness of the defendant's confession.

Following the Denno decision, the Michigan Supreme Court, on a rehearing, remanded the Walker Case to the trial judge directing him to hold an evidentiary hearing on the voluntariness of the confession. 374 Mich 331 (1965)

The trial judge did hold an evidentiary hearing on the voluntariness of the confession and concluded that the confession was, in fact, voluntary.

That decision by the trial judge was appealed to the Court of Appeals. The Court of Appeals affirmed the trial judge once again. 6 Mich App 600 (1967)

The decision of the Court of Appeals affirming the trial judge was appealed to the Michigan Supreme Court. The Michigan Supreme Court refused to rehear the case which, in effect, affirmed the decision of the trial judge and the Court of Appeals. 379 Mich 781 (1967)

The United States Supreme Court was asked to review the decision of the Michigan Supreme Court. The United States Supreme Court refused to do so. 393 US 1028, 89 S.Ct. 637, 21 L.Ed. 2d 572 (1969)

Eighteen years later, Recorder's Court Judge Robert Evans, on May 15, 1972, reviewed the case and entered an order granting Walker a new trial. Judge Evans held that the confession by Walker to the murder of John Drousitious was inadmissable. In effect, Judge Evans reversed the rulings of another Recorder's Court judge, the Court of Appeals, the Michigan Supreme Court, and the United States Supreme Court. His opinion is contrary to the law as it existed at the time of the trial and as it exists now. Unfortunately, however, the People had no automatic right to appeal. The People's request for a review of Judge Evan's rulings by the Court of Appeals was denied on September 21, 1972.

The People are stuck with the rulings of Judge Evans.

There is no way that we can retry this defendant. The witnesses have died, and the evidence has been destroyed.

There has never been a finding that Walker was innocent — even by Judge Evans — nor could there be such a finding. Lee

Dell Walker murdered John Drousitious. There is no other conclusion that can be reached by any fair-minded person who reviews the evidence in this case. In fact, a jury concluded beyond all reasonable doubt that Walker did, in fact, murder John Drousitious.

The lesson learned is that if a criminal tries long enough and hard enough and if he goes through enough judges, sooner or later he will find one sympathetic to his cause.

If Lee Dell Walker is to be rewarded with $25,000, give it to him for his persistence. Do not commit the final perversion of stating that a guilty man is innocent.

Very truly yours,

/s/ William L. Calahan
Prosecuting Attorney
County of Wayne

WLC:mg

cc: House Committee on Appropriations
Chairman: William R. Copeland
Members: Dominic J. Jacobetti
James S. Farnsworth
Bobby D. Crim
Russell Hellman
Bill S. Huffman
Raymond C. Kehres
Dale E. Kildee
Earl E. Nelson
Gary M. Owen
Joseph M. Snyder
Richard A. Young
James J. Damman

cc: House Committee on Appropriations
Members: Melvin DeStiger
William L. Jowett
Peter Kok
Thomas G. Sharpe
Hon. Bobby D. Crim
Majority Leader
Hon. Clifford H. Smart
Minority Leader
Hon. James H. Brickley
Lieutenant Governor

APPENDIX F

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

LEE DELL WALKER,
Plaintiff,

Special Civil Docket

vs.

Civil Action No.
75-052476

WILLIAM CAHALAN,
PETE WALDMEIR,
THE DETROIT
NEWS,
Jointly and Severally,
Defendants.

BARBARA, WISEK, TAVOULVARIS, RUBY & DOMOL, P.C.
Peter R. Barbara P10413
Attorneys for Plaintiff
2268 City National Bank Building
Detroit, Michigan 48226
Telephone: 961-7704

COMPLAINT

NOW COMES the above named plaintiff, by and through his attorneys, BARBARA, WISOK, TAVOULVARIS, RUBY & DOMOL, P.C., and files this Complaint in a plea of trespass on the case in commencement of suit against the defendants herein and says as follows:

COUNT I

1. That plaintiff, Lee Dell Walker, is a resident of the City of Detroit, County of Wayne and State of Michigan.

2. That defendant, William Cahalan, is a resident of Wayne County, Michigan.

(a) That the defendant, William Cahalan, is and was at all times hereinafter mentioned the Wayne County Prosecutor.

3. That at all times hereinafter mentioned and prior and subsequent thereto, defendant The Detroit News was and still is a corporation duly organized and existing under the laws of the State of Michigan, having a place of business at 615 Lafayette Blvd. in the City of Detroit, County of Wayne and State of Michigan, and having as a registered agent Richard M. Spitzley at 615 Lafayette Blvd., Detroit, Wayne, Michigan.

(a) That The Detroit News is engaged in publishing a newspaper of general circulation, known as "The Detroit News".

4. That defendant, Pete Waldmeir, is a resident of the State of Michigan and employed by the defendant, The Detroit News, Inc. as a columnist. And at all times hereinafter mentioned was an agent of the defendant The Detroit News, Inc. and within the scope of his agency.

5. That the plaintiff, Lee Dell Walker, was charged with murder in the first degree in connection with the death of John Drousitious and convicted of said crime on June 23, 1954.

6. That at all times prior to said conviction and subsequent thereto, the plaintiff Lee Dell Walker has consistently maintained his innocence of said charges.

7. That the plaintiff, Lee Dell Walker, is not guilty of murder in the first degree, nor of any crime whatsoever in connection with the death of John Drousitious.

8. That the aforesaid conviction of plaintiff, Lee Dell Walker, was a serious miscarriage of justice as the conviction was the result of serious trial and pre-trial irregularities, including a coerced confession, predicated on false testimony, contrary to the great weight of the evidence, and influenced by racial prejudice on the part of the jury, court and prosecution which constituted a denial of plaintiff's constitutionally protected right to due process of law.

9. That for the aforesaid, plaintiff was granted a new trial by the Honorable Robert Evans, Recorders Court Judge, on May 15, 1972.

10. That the defendant, William Cahalan, pursuant to his authority as Wayne County Prosecutor, dismissed the charges against the plaintiff, Lee Dell Walker, on December 12, 1972 due to the impossibility of securing a second conviction, in view of the paucity of incriminating evidence.

11. That in December of 1973, in order to partially compensate the plaintiff for the injustice inflicted upon him, a bill was introduced in the Michigan Senate, *viz.*, Senate Bill No. 1051.

12. That said Senate Bill was passed and sent to the Michigan House of Representatives in July of 1974.

13. That on September 19, 1974, defendant, William Cahalan maliciously and willfully defamed the plaintiff by composing and writing a letter containing false and defamatory matter concerning plaintiff, to-wit: That John Drousitious was murdered by plaintiff and that the plaintiff was eventually released only through criminal persistence and adroit machinations.

14. That the words in the aforementioned letter were meant by the defendant and were understood to mean that the plaintiff was and is a heinous criminal and therefore unfit for society.

15. That the letter was sent, published and communicated by the defendant William Cahalan to the House Committee on Appropriations and was sent, published and communicated by the defendant William Cahalan to various newspapers with mass circulation including The Detroit News and The Detroit Free Press; or, in the alternative, that the libelous content of said defamatory letter was made known to the general public and it was reasonably foreseeable that such publication and communication would result from the writing and sending of the letter.

16. That the statements in the aforementioned letter concerning the plaintiff were and are wholly false and malicious; and by the reason of communication and publication thereof, plaintiff Lee Dell Walker has been greatly injured in his reputation and has been exposed to public hatred, contempt and ridicule.

(a) That demand for retraction was made of defendant and refused.

17. That by reason of the communication and publication of the aforesaid statements, plaintiff Lee Dell Walker has been injured in his occupation as an employee for the State Appellate Defender's Office.

WHEREFORE, and for all of which damages and injuries, plaintiff Lee Dell Walker demands judgment against the defendants, and each of them, that is fair and just in accordance with evidence produced in Court, but in no case to exceed the sum of One Million ($1,000,000) Dollars, compensatory damages, and a sum not to exceed One Million ($1,000,000) Dollars punitive and exemplary damages, together with interest, costs and attorney fees.

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEE DELL WALKER,
Plaintiff,

vs

No. 75-70380

WILLIAM CAHALAN,
Defendant,

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

WILLIAM L. CAHALAN, being duly sworn, deposes and says:

1. He is a defendant in the above-entitled action, and if called as a witness is competent to testify to the facts stated herein.

2. He is now and was on and before September 19, 1974 the Wayne County Prosecutor.

3. That he felt it a matter of public interest that the Michigan legislature was considering the expenditure of public funds to compensate Lee Dell Walker, based on the premise that Walker had been unjustly convicted due to false testimony and mistake in identity.

4. That he felt it a matter of public interest that he was opposed to the aforesaid appropriation.

5. That he therefore communicated his opposition to the Hon. William Copeland, Chairman, House Committee on Appropriations, to the committee members, the majority and minority leader, lieutenant governor, and Pete Waldmeir and The Detroit News.

6. That at all times he did and still does believe that all statements in the letter relative to Lee Dell Walker are true, having been based on the official records of the cause.

7. That at no time in the past nor presently does he have any awareness of falsity nor has he ever nor does he now entertain any doubts as to the truth of the statements contained in the letter.

/s/ WILLIAM L. CAHALAN

Subscribed and sworn to before me this 4th day of June, A.D. 1977

/s/ Stephanie Masis
Notary Public,
Wayne County, Michigan
My Commission Expires:
May 5, 1980